MK Railway Corporation *and* International Union of Operating Engineers, Local 542, AFL–CIO. Cases 4–CA–23222–1 and 4–RC–18429

October 19, 1995

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On July 21, 1995, Administrative Law Judge George Aleman issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party Union filed an answering brief, and the General Counsel filed a cross-exception and a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, MK Railway Corporation, Mountaintop, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[Direction of Second Election omitted from publication.]

[1] The General Counsel's cross-exception asserts that the judge incorrectly found, in sec. II,B, par. 6 of his decision, that employee Joseph Healy testified that Vice President Gregg Lucier's threat to relocate work to Mexico was made ''soon after he [Healy] observed a sign posted in the employee toolcrib reading, 'VOTE YES AND LOSE YOUR JOB TO MEXICO,''' but that Healy in fact testified that Lucier's statement occurred right before Healy observed the posted sign. We have reviewed the record and find merit in the General Counsel's cross-exception and shall accordingly correct the judge's erroneous finding which has not affected our decision.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolution unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. This case was tried before me in Mountaintop, Pennsylvania, on February 8 and 9, 1995, based on a charge filed on October 25, 1994, amended on December 21, 1994, and a petition for a representation election filed on August 5, 1994,[1] by the Union, International Union of Operating Engineers, Local 542, AFL–CIO. A complaint in this matter was issued on December 29, 1994, by the Acting Regional Director for Region 4 of the National Labor Relations Board (the Board), alleging that MK Rail Corporation (the Respondent), violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening employees with job loss and a relocation of work to Mexico if they selected the Union as bargaining representative, and violated Section 8(a)(3) and (1) by discharging an employee, Joseph Laird, for engaging in union activities. The Respondent's threat is alleged to constitute objectionable conduct affecting the results of the election in Case 4–RC–18429. By order dated January 11, 1995, the Regional Director consolidated Cases 4–CA–23222–1 and 4–RC–18429 for hearing. Thereafter, the Respondent filed an answer dated January 12, 1995, admitting some and denying other allegations in the complaint, and denying the commission of any unfair labor practices. On February 7, 1995, the Regional Director issued an order approving partial withdrawal of the charge and dismissing the complaint allegations pertaining to the Laird discharge.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Respondent, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION

The Respondent is a Delaware corporation engaged in the remanufacture of locomotives at its facility in Mountaintop, Pennsylvania. During the past year, the Respondent, in the conduct of the above operation, sold and shipped goods valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Allegations*

The complaint, as noted, alleges that the Respondent, through former senior vice president for operations, Greg Lucier,[3] violated Section 8(a)(1) of the Act, and engaged in

[1] All dates are in 1994, unless otherwise indicated.

[2] The findings of fact made in this case are based on a compilation of the credited testimony, exhibits, and stipulations of fact, viewed in light of logical consistency and inherent probability. Although these findings may not contain or refer to all of the evidence, all has been weighed and considered. To the extent that any testimony or other evidence not mentioned in this decision may appear to contradict my findings of fact, I have not disregarded that evidence but have rejected as not credible, lacking in probative weight, surplusage, or irrelevant. Credibility have been made on the basis of the entire record, including the inherent probabilities of the testimony and the demeanor of the witnesses. Where required, I have set forth specific credibility findings.

[3] Lucier was no longer employed by Respondent as of the date of the hearing.

objectionable conduct, by threatening to transfer work from its Mountaintop facility to its Mexico facility if employees selected the Union as their collective-bargaining representative. Resolution of this issue requires that the following two questions be answered: (1) Did Lucier make the statements attributed to him by the General Counsel; if so, (2) did the statement unlawfully interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The answer to the first question depends on which version of events is the more credible, that provided by the General Counsel's witnesses, principally Joseph Healy, or that of the several witnesses who testified on Respondent's behalf.

B. *Facts*[4]

In April 1994, the Respondent became engaged in the business of remanufacturing full-size locomotives in Mountaintop, Pennsylvania.[5] The Respondent also owns and operates other facilities in Boise, Idaho, and San Luis Potosi, Mexico. Its Boise facility performs work similar to that done at Mountaintop, while its Mexican facility is primarily engaged in operation and maintenance of locomotives for the Mexican government. At all times relevant to this proceeding, the Respondent was under contract to rebuild or remanufacture approximately 72 locomotives owned by Southern Pacific Railroad (the SP contract). The ''rebuilding'' process involved an assembly line type procedure in which a locomotive would pass through nine different stations or ''spots'' in the Respondent's Mountaintop facility where it would be broken down into component parts, power-washed, stripped of paint, and then, utilizing welders, electricians, and other workers, structurally built up again, with the entire process ideally expected to take approximately 66 days. The Respondent's complement of employees numbered approximately 300.

On August 5, the Union petitioned the Board for an election seeking to represent all of Respondent's full-time and regular part-time production and maintenance employees. An election was thereafter held on September 29 and 30, which the Union lost by approximately 28 votes. On October 7, the Union timely filed the above-mentioned objection to the election and, on December 21, it filed the charge alleging that such conduct also violated Section 8(a)(1).

Prior to the election, both the Union and Respondent campaigned actively for employee support. The record reflects that as part of its campaign, the Union held various employee rallies and distributed literature to employees (see R. Exh. 3), while the Respondent, for its part, held meetings with employees during which it sought to convince employees that a union was not needed at Mountaintop. It is alleged that during one such meeting, the Respondent, through its vice president of operations, Gregory Lucier,[6] made the comment which is the basis for the charge, and for the conduct alleged as objectionable in the representation case.

1. Testimony of employee Healy and Union Agents Carlos Smith and Joseph Giacin

Healy has been employed as a welder by the Respondent since February 1993, on its second shift which runs from 3:30 p.m. to 12 a.m. He testified that in August 1994, soon after the Union filed its petition for an election, the Respondent held a meeting with all second-shift employees at its cafeteria, which Healy described as an antiunion meeting. According to Healy, approximately 60 employees attended this meeting, which began about one-half hour after the start of his shift, and lasted about one-half hour. Present at this meeting on behalf of management were Lucier, and Plant Manager James Fote. Following Fote's introduction, Lucier, according to Healy, began telling employees that ''he had 3 million or 30 million invested in MK Rail,'' and that ''he was going to get his money back out.'' He further told them about Respondent's other affiliates located in Cornell, New York, Boise, Idaho, and in Mexico, after which he began discussing the Union. According to Healy, Lucier stated that ''if the Union came in, he'd have to look at one of his other options, and that would be diverting work to Mexico.'' Healy recalled that when one employee, whom he believed to be employee Bob Black, asked why Lucier would divert work to Mexico, Lucier simply replied, ''cheaper labor'' (Tr. 11). Healy admitted he could not recall Lucier's exact words but that the above represented the gist of what he told employees during that August meeting. On cross-examination, Healy stated that Lucier generally described the other plants where work could go, and expressed the view that a union was not needed at Mountaintop.

Although Healy was unable to pinpoint the exact date of the August meeting, he was certain it occurred in August because he recalls it took place soon after he observed a sign posted in the employee toolcrib reading, ''VOTE YES AND LOSE YOUR JOB TO MEXICO.'' Healy maintained that the sign was posted for about 2 weeks and that he thereafter mentioned it to Union Business Agent and Organizer Carlos Smith.[7]

Smith testified that the posting of the notice was called to his attention by several employees, including Healy, at a union rally in late August, and again a few days later. He testified that Joseph Giacin, the Union's international representative, in his presence, called Respondent's human resource manager, James Dermody, to complain about the posting and that, to the best of his knowledge, the sign was taken down after that conversation.

Smith's testimony was in most respects corroborated by Giacin who testified that at a Union rally held on September 1, he was told by Smith and other employees about the sign, and that he first attempted to contact Fote on September 8 regarding its posting. Unable to locate Fote, Giacin called Dermody who told him that he was aware of the sign and would look into and take care of it. Dermody told Giacin that he had seen other derogatory signs posted and, according to Giacin, stated that he wanted to demonstrate his good faith by removing the signs so as to avoid the need for the filing of unfair labor practice charges. Dermody's testimony as to the timing of his conversation with Giacin regarding the posted notice essentially concurs with Giacin's recollection of events. Thus, he testified that the sign came down on Sep-

[4] G.C. Exh. refers to General Counsel's exhibits; R. Exh. to Respondent's exhibits; and C.P. Exh. to Charging Party's exhibits.

[5] The Respondent previously operated as the locomotive division of Morrison Knudson Corporation.

[6] As of the date of the hearing, Lucier was no longer employed by Respondent.

[7] The notice posting is not alleged as an unfair labor practice.

tember 1, and that when he spoke to Giacin, he told him the sign had been taken down 1 week ago, which coincides with Giacin's testimony that he spoke to Dermody on September 8, after failing to reach Fote.

2. Testimony of Lucier, Plant Manager James Fote, and Human Resources Manager James Dermody

During 1994, Lucier served as Respondent's senior vice president in charge of operations, a position he had held with Respondent's predecessor. He testified that Respondent agreed to the holding an election among its employees but that it had officially decided to oppose unionization efforts at the Mountaintop facility because it felt a union was not needed to represent the employees' interests. With that in mind, Respondent conducted a ''do's and don'ts'' training session for supervisory and managerial personnel on August 31, and brought in expert outside counsel to provide them with an understanding of pertinent regulations, and to advise them as to what they could and could not say during an organizing campaign. Lucier testified that the Respondent's campaign did not ''officially'' begin until after the ''do's and don'ts'' session and, for the most part, consisted of weekly mailings and small group meetings with employees in which it explained why it was opposed to the Union.

Although he apparently spent most of his time at the Boise, Idaho facility, Lucier recalled having met with Mountaintop employees on only three occasions (June 2–3; August 5; and September 13) during 1994.[8] According to Lucier, the purpose of the June 2–3 meeting was to update employees on events at the company. While he stated that no issues were raised about the union at the June 2–3 meeting, he did recall that a vague question was asked as to how the new activities at the Mexico facility would impact on activities at Mountaintop. Lucier testified he did not quite understand the question and that he repeated it by stating, ''[I]f your question is, do we intend to send work from Mountaintop to Mexico, the answer is no.'' He went on to explain that the Mexico facility was engaged in operations and maintenance work, and that ''some very preliminary analysis'' had been made ''to see what we could do in Mexico in the event both Mountaintop and Boise, our other major locomotive remanufacturing center, were filled to capacity.'' He stated that employees were told that Respondent ''did not intend to send work from Mountaintop to Mexico, or from Boise to Mexico'' because it had invested significant money in both people and assets, and was committed to those locations.

As to the August 5 meeting, Lucier testified he ''vividly'' recalled what transpired because his boss, John Herbots, was also present. Unlike the other two meetings which occurred in small employee groups, the August 5 meeting was a plantwide meeting of employees. After being introduced by Fote, Lucier thanked employees for doing an excellent job in June and July for nearing the completion of the schedule as originally planned, and empathized with their view that things were not perfect at the plant. He purportedly assured them that Respondent would try to improve the situation as fast as possible. Lucier also recalled that when Herbots addressed the employees, he was asked his opinion regarding a union at Mountaintop, and that Herbots replied that Respondent did not care if employees selected the Union to represent them because it intended to continue with its work at Mountaintop, as is. Lucier claims he became upset at Herbot's comments because Respondent's official stated position was that it opposed unionization of the Mountaintop employees. Lucier testified that no questions regarding Mexico were asked during the August 5 meeting, and that no other employee meetings were held in August.

The September 13 meeting, according to Lucier, was part of its campaign to convince employees that a union was not needed. Lucier identified it as a ''one, two'' punch in which Fote addressed employees first, telling them about the Board's election process, the importance of their vote, and how they should vote their conscience, followed by Lucier's comments of 10 to 15 minutes' duration in which he updated employees about events at the company, and explained why the Respondent, and not the Union, could best represent the employees' interests. Lucier stated no questions were asked at this meeting regarding Mexico, and further denied having made any reference to ''cheap labor'' at any of the employee meetings.

Dermody testified he coordinated the Respondent's campaign, and served as ''clearinghouse'' for any questions posed by employees to supervisors regarding the organizational campaign. Dermody was also responsible for scheduling employee group meetings, all of which he claims he attended. Regarding meetings attended by Lucier, Dermody recalled only a June 2 meeting, and did not recall Lucier attending any employee meetings in August or September.[9] While he recalled that Lucier may have visited the plant during that time period, at one point with Herbots, Dermody was certain that Lucier did not address the employees as a group. He recalled there being four employee meetings in September, but testified these were attended only by Fote and himself. Regarding the June meeting, Dermody stated that Lucier spoke to employees about the SP contract and allegedly updated them on the project. During that meeting, according to Dermody, Lucier was asked by an employee whether MK Rail would remanufacture locomotives in Mexico, and that Lucier responded, ''No.'' Dermody did not recall hearing Lucier make the ''options'' remark during the June meeting.

Fote testified that following the filing of the petition, management took steps to educate its supervisory staff as to what could or could not be said during the campaign, and that Lucier was present at the training session held for that purpose. Regarding employee meetings, Fote stated that before the petition was filed, Respondent held general employee meetings on the factory floor, and that following the filing of the petition, employee group meetings were held in the cafeteria. Fote recalls that between August 5 and September 30, approximately six employee meetings were held and that Lucier attended three of them. He further recalled there being only one general employee meeting in August during which Lucier and Herbots addressed employees regarding the SP

[8] Prior to June 2, Respondent, according to Lucier, tried to hold quarterly meetings with employees to update them on the Company's progress on its projects.

[9] He expressly disagreed with Fote's testimony that Lucier met with employees in August and September. He also stated that Respondent had retained Lucier's itinerary and would be able to verify whether or not Lucier visited the plant during those months and the purpose of the visit. Lucier's itinerary, like Fote's notes, was not produced at the hearing.

contract and other company matters. However, Fote did not remember the date of the August meeting, or for that matter of any other meeting (except for an August 5 meeting), and while he was able to recall the overall purpose of the meeting, e.g., to bring employees up to date on the SP contract and other matters, Fote could not recall if Lucier made any comment regarding the Mexico facility or mentioning ''cheaper labor.''[10]

Fote, however, was able to recollect that at certain employee meetings he conducted, employees expressed concern regarding rumors that Respondent would move its Mountaintop facility to Mexico if the Union got in, and that he responded, ''Hell, no'' to such remarks. He explained that his reason for responded as he did was because he knew what the capabilities were of the Mexico facility, and that there was never any discussion among management of even the remotest possibility of moving work to Mexico. While he denied on direct examination that Lucier was present at such meetings, on cross-examination, Fote admitted he could not recall whether or not Lucier was present when he made his ''Hell, no'' comment.

3. Testimony of employees Anthony Vino, John Baloga, and Glenn Maciejszak

Employees Vino, Baloga, and Maciejszak were called by the Respondent to corroborate Lucier's testimony. Vino was a production line employee who was employed on the second shift during the relevant period here. Vino testified to having attended meetings at which Lucier addressed employees, but was unable to state the date or month in which these meetings occurred. He further testified that during one such meeting held in the cafeteria, an employee, whom he identified as Lester Weeks, asked Lucier something to the effect that ''if the union did get in, locks would be put on the fence and the whole company moved to Mexico.'' According to Vino, Lucier responded by stating that ''there were options'' and ''he would have to foresee in the future.'' Vino stated that Lucier was not trying to ''[pinpoint] any answers,'' and was merely saying ''there would be options, and he hoped it wouldn't come to that.'' Lucier went on to discuss how the Respondent currently had a ''very open door policy'' and wanted to keep it that way. In an effort to downplay the significance of his testimony in this regard, Vino described Weeks' question to Lucier as ''loaded'' and ''senseless,'' and that given the way it was phrased there would be no ''right'' answer that Lucier could have given. However, when pressed by counsel for the General Counsel, Vino conceded that Lucier could have simply responded ''No'' to the employee's question.

Baloga, like Vino, worked the second shift where he served as a working leader, and recalls having been at several meetings at which Lucier spoke to employees. On direct examination, he could not recall Lucier stating at any meeting that if the Union got in, he would look at other options, one of which would be diverting work to Mexico because of cheaper labor. However, on cross-examination, Baloga testified that at one such meeting (he could not recall the date of the meeting) called by Respondent to express its views on the Union, an employee raised the issue of work going to Mexico, and that Lucier talked for a few minutes and ''just skirted the issue more or less.'' When pressed for details on what Lucier actually said, Baloga stated that Lucier's response ''didn't make much sense to me, it wasn't relevant to the question'' and that Lucier ''didn't answer the question pertaining to Mexico in any specific way'' or ''to my liking anyway.'' On further questioning, Baloga testified that Lucier stated that ''things would be different if the union got in'' and that that was the gist of what was said at the meeting. Baloga stated that what Lucier had to say was not important to him so he ''just blew it off'' and did not concentrate on what was said. On redirect examination, Baloga reiterated that Lucier did not make any comment about diverting work to Mexico, and that had such a statement been made, he would have heard it. Baloga admitted being opposed to the Union, but claimed he remained neutral during the entire campaign.

Maciejszak is employed as work leader in charge of the ''fab'' shop on the second shift. He testified to having heard some discussion among employees expressing fear the Respondent might ''pack up and go to Mexico if the Union got in.'' Maciejszak admitted having attended two second-shift meetings in the cafeteria at which Lucier was present, but could not recall hearing any discussion about Mexico or Lucier tell employees that he would divert work to Mexico because of cheaper labor if the Union got in. He testified that Lucier ''more or less'' stated he wanted to give Respondent's customers a good product and that he would like to ''stay the way we are without a third party if that is possible.'' Maciejszak stated that he did not take anything Lucier said as a threat to him. Although the meetings, according to Maciejszak, lasted anywhere from 30 to 45 minutes, he was not able to recall much more of what was said during those meetings.

C. *Discussion and Findings*

It is patently clear from the testimony of witnesses for both counsel for the General Counsel and the Respondent that the question regarding the possible transfer of work from Mountaintop to Mexico if the Union won the election was not only a matter of discussion and concern among employees, but was also raised at management meetings with employees.[11] Having fully considered all testimony adduced at the hearing, I credit Healy's account that at a group meeting of employees held sometime in mid to late August, after the representation petition was filed, Lucier told employees that the transfer of work from Mountaintop to Mexico because of cheaper labor was an option he would consider if the Union got in. Healy's testimony generally was supported by Respondent's own witness, employee Vino. Vino, as noted, could not recall the particular date of any meeting he attended; nevertheless, he testified candidly and forthrightly that at one such meeting, Lucier told employees that should the Union win the election, he had options available to him one of which was moving work to Mexico, and that he hoped it wouldn't come to that. Vino's version differs from

[10] Although Fote testified that he took notes at all meetings attended by Lucier, these were not produced at the hearing.

[11] Thus, while disagreeing with Healy as to what was said and when to employees, except for Maciejszak, all of Respondent's witnesses testified to having heard some discussion regarding Mexico at employee meetings. Maciejszak stated only that he could not ''recall'' the topic being discussed.

Healy's only in that the former did not testify to hearing the remark about ''cheaper labor.'' In most other respects, however, Vino's account of what he heard Lucier tell employees substantially accords with Healy's testimony.

In crediting Healy's testimony, I reject Lucier's denial that he made such a statement to employees. Lucier, as noted, admitted only that during a June 2 plantwide employee meeting, attended by Fote and Herbots, he responded to a ''vague'' question from an employee which he claims he ''didn't quite understand,'' and that he sought to allay any fears by telling employees that Respondent had no intentions of sending Mountaintop work to Mexico. I disagree with Respondent's contention in its posthearing brief that Lucier's testimony is corroborated by Fote and Dermody. Fote, for example, who claimed to have attended all of Lucier's meeting with employees, stated that all of Lucier's meetings occurred between August 5 and September 30, and made no mention of the June 2 meeting referred to by Lucier. Further, while Lucier readily admitted that the subject of moving work to Mexico was raised at one meeting, Fote was not able to recall any such comments being made. Thus, despite Lucier's assertion that Fote was present during this meeting, Fote was unable to corroborate Lucier as to the timing of the meeting, on whether the subject of work going to Mexico was raised, and regarding Lucier's claim that he reassured employees that work would not be diverted to Mexico. Fote further claimed to have taken notes of the meetings he attended and to have recorded the dates of such meetings. Unfortunately for the Respondent, such notes were not produced. Given his poor recollection of events while on the witness stand, production of such notes clearly would have gone a long way to verifying Fote's version of events. His failure to produce such notes persuades me that the notes either do not exist or, if produced, would not have supported Fote's testimony.

Dermody's testimony fares no better, in my view. Thus, Lucier's testimony that he attended employee meetings on August 5 and September 13, conflicts with Dermody's testimony that Lucier did not attend any August or September meetings with employees, and is in further conflict with Fote's recollection of Lucier having attended at least three employee meetings between August 5 and September 30. According to Dermody, only he and Fote, not Lucier, addressed employees at meetings held during those months. Dermody's testimony regarding the June 2 meeting also lacks credence. He testified, for example, that during the June 2 meeting, an employee asked whether Respondent intended to do remanufacturing work in Mexico, and that Lucier responded, ''No'' to the question. In an apparent effort to bolster his direct testimony, Lucier, during cross-examination, declared he had taken ''extensive'' notes and recorded what transpired at that meeting, including the employee's question and Lucier's answer to the Mexico inquiry. However, when confronted with his notes of the June meeting, which were obtained during the underlying investigation in this case, Dermody conceded that his notes contained no reference to a colloquy between Lucier and an employee regarding Mexico. Admitting that he had not, contrary to his earlier testimony, recorded such a discussion, Dermody sought to make light of this inconsistency by stating that he chose not to record the conversation because he ''thought the question was stupid, and I thought the topic was superfluous.'' Dermody's further testimony that the Mexico comments occurred at the June 2 meeting contradicts a prior statement in his sworn affidavit to the Board that he could not recall if the comment was made at that meeting. Given the inconsistencies and discrepancies in his testimony, I do not credit Dermody's testimony.

Further, none of the employee witnesses who testified for Respondent could corroborate Lucier's testimony. For example, although Baloga could not recall having heard Lucier make any remark about the company having ''options'' or making reference to ''cheaper labor,'' he nevertheless admitted not having paid much attention to what was being said and just ''blew off'' Lucier's speeches as being unimportant. Baloga was able to recall only that an employee asked Lucier a question regarding work going to Mexico during some unspecified meeting, that Lucier ''skirted the issue,'' and that the response was not to Baloga's liking. Baloga did not state what the response was. This latter testimony by Baloga suggests that Lucier, rather than reassuring employees about its plans, left doubt as to whether work would be sent to Mexico should the Union prevail. Baloga's further admission that he was not satisfied with the answer lends credence to the view that Lucier did not provide the assurances he claims.

Respondent sought to rehabilitate Baloga on redirect examination by getting him to admit that if Lucier had made a comment about work going to Mexico due to cheaper labor he would have ''remembered it.'' In light of his prior testimony, however, that he could not recall whether such a statement was made, and his admission that he paid little attention to what was said during such meetings, his claim that he would have remembered any such remark by Lucier is purely self-serving and is entitled to no weight.

Maciejszak, like Baloga, also had a poor recollection of what was said by Lucier at meetings he attended. Despite having attended two meetings and testifying they lasted anywhere from 30 to 45 minutes, Maciejszak recalled very little of what was said, and testified only generally as to topics discussed. The only specific thing he recalls being said by Lucier during those meetings was that he (Lucier) wanted to give Respondent's customers a good product, and would like to continue operating without a ''third party'' being present. I find Maciejszak's overall testimony to be vague and of little evidentiary value. I, therefore, accord it no weight.

Having found that Lucier told employees in mid to late August that ''if the Union came in, he'd have to look at one of his other options, and that would be diverting work to Mexico'' because of ''cheaper labor,''[12] the question remains whether Lucier's comments violated Section 8(a)(1) of the Act. Clearly, an employer may, without violating the Act, make a prediction on the basis of objective facts as to the

[12] The Respondent asserts in its posthearing brief that Healy's testimony regarding an ''impression'' he received during the alleged Lucier statement suggests that Healy did not actually hear Lucier make such a statement, but had, instead, been influenced by a written comment in a coupon book circulated by the Union to employees which made reference to the relocation of work to Mexico (see R. Exh. 3). The Respondent mischaracterizes Healy's testimony in this regard. Healy's ''impression'' reflected his understanding of what Lucier intended to do based on the latter's actual comments to employees. Thus, Healy heard Lucier state that one of his options should the Union win was to relocate work to Mexico, and on the basis of those comments got the ''impression'' that the Respondent intended to shift work from Mountaintop to Mexico.

likely consequences, beyond its control, that unionization might have on its continued operation. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Lucier's comments, however, do not satisfy the *Gissel* criteria, for they patently reflect that any such decision to relocate work to Mexico was contingent exclusively on the Union's success or failure in the upcoming election, and not on economic hardships beyond the Respondent's control that might result should the Union prevail in the election. In these circumstances, I find that Lucier's remarks were designed to convey to employees that they ran the risk of losing their jobs through either the closure of the facility at Mountaintop or the diversion of work to the Mexico facility if they selected the Union as the bargaining representative. As such, the remarks were coercive and interfered with the employees' exercise of the Section 7 rights, and violated Section 8(a)(1) of the Act, as alleged. Indeed, Lucier's remarks are not unlike those previously found to be unlawful by the Board. See, e.g., *A.M.F.M. of Summers County*, 315 NLRB 727, 732 (1994) (telling employee that employer would sacrifice and close its facility to save other facilities from union); *House of Raeford Farms*, 308 NLRB 568, 571 (1992) (telling employees they might be out of job if union is voted in); *Telex Communications*, 294 NLRB 1136, 1139 (1989) (supervisor's response to employee question during employee meeting that if union won and employer were forced to pay higher wages employer might have to move); *Brunswick Corp.*, 282 NLRB 794 (1987) (supervisor's rhetorical question to employee on movement of plant to Mexico); *Rood Industries*, 278 NLRB 160, 162 (1986) (statement that employer would remove machinery from plant and possibly move to Illinois should union win); and *Coeburn Garment Co.*, 276 NLRB 1481, 1482 (1985) (statement to employees that work would be shipped elsewhere if union was successful and got in the plant).

The Respondent here, however, does not contend that Lucier's remarks were privileged under the *Gissel* standard. Rather, it contends that Lucier made no such statements, and that even if Lucier made the remarks attributed to him by Healy, ''no reasonable person could possibly have construed [his] comments'' as a threat to divert work or jobs from Mountaintop to Mexico should the Union win. As noted, I do not credit Lucier's denial but rather credit Healy that the remarks were in fact made. Regarding its latter contention, the Respondent relies on statements made by Vino and Maciejszak that that they did not feel threatened by any of Lucier's comments. However, the test for whether an employer's conduct or remark amounts to interference, restraint, or coercion does not depend on an employer's motive nor on the successful effect of such coercion. *El Rancho Market*, 235 NLRB 468 (1978); also *National Apartment Leasing Co.*, 263 NLRB 15 (1982). Rather, the illegality of an employer's conduct is determined by whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act. *El Rancho Market*, supra. I note in this regard that while Vino testified he personally had not felt threatened by Lucier's remarks, he readily admitted that ''some people could'' have felt threatened by such remarks.

The Respondent further argues that if Lucier is found to have made the statements, the subsequent assurances he gave to employees, and the ''Hell, No!'' answer given by Fote to employees in response to inquiries about work going to Mexico, served to disavow his prior remarks, and negated Healy's ''impression'' that work would be diverted to Mexico. However, as indicated, neither Lucier nor Fote were credible witnesses. Although both claimed to have attended the same meetings, Lucier's and Fote's testimony differed on when such meetings occurred,[13] and as to what was said during the meetings. Further, none of the employee witnesses called by Respondent to corroborate Lucier testified to having heard the latter expressly tell employees that work would not be diverted to Mexico, as claimed by Lucier. In fact, Maciejszak's testimony that Lucier did not answer the question on Mexico to his liking and that he just ''skirted the issue,'' suggests that Lucier did not disavow or repudiate his unlawful remarks but rather left the subject dangling in the air for employees to ponder. Similarly, employee Vino testified only to having heard Lucier state that he had the option of moving work to Mexico, but hoped it wouldn't come to that. He made no mention of having heard Lucier's purported disavowal or hearing Fote make his ''Hell, No'' remark. The credible evidence of record convinces that neither Lucier nor Fote gave employees the assurances suggested by the Respondent, and made no effort to disavow or repudiate Lucier's unlawful remarks.[14]

The Respondent further argues that if Lucier is found to have made the remarks, Healy was the only person to have heard the comments and, in these circumstances, the comments were isolated in nature and could not have been coercive. However, as Healy credibly testified, some 60 employees were present at the meeting when Lucier made his threat to divert work to Mexico. It is not unreasonable to believe that others present at that meeting would have heard Lucier's remarks, and may have been persuaded by Lucier's threat to vote against the Union. Accordingly, I find that Lucier's threat to divert work to Mexico if the Union were to be voted in, made to a group of approximately 60 employees, was neither isolated nor de minimis, and was coercive of employee rights. See *House of Raeford Farms*, supra at 718. In these circumstances, Lucier's threat is found to have violated Section 8(a)(1) of the Act.

Lucier's unlawful remarks, as noted, are found to have occurred in mid to late August, during the critical period between the filing of the petition on August 5, and the holding of the election on September 29–30. In *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962), the Board held that ''conduct violative of Section 8(a)(1) is, a fortiori, conduct which inter-

[13] According to Lucier, his recollection of when he met with employees at Mountaintop was based on information provided to him by his former secretary as to the dates he visited Mountaintop. Lucier admitted not having personally reviewed his itinerary, ''daytimer,'' or travel records to confirm those dates. However, despite the inconsistencies between Fote's and Lucier's testimony as to when he met with employees, none of the documents or records relied on by Lucier were produced at the hearing, leading me to believe that if produced, they would not have supported Respondent's case.

[14] *Gaines Electric Co.*, 309 NLRB 1077 (1992), relied on by Respondent in its posthearing brief, is factually distinguishable from the instant case. Unlike the Respondent here, the employer in *Gaines*, after threatening employees with plant closure, prepared and caused to be circulated to each employee a written and unambiguous statement expressly disavowing and repudiating its threat, and providing assurances to employees of their Sec. 7 rights and that it would not engage in any further unlawful conduct.

feres with the exercise of a free and untrammeled choice in an election.'' The Board departs from this policy only in cases where it is virtually impossible to conclude that the misconduct could have affected the election results. See, *Gonzales Packing Co.*, 304 NLRB 805 (1991); quoting from *Clark Equipment Co.*, 278 NLRB 498, 505 (1986). The record reflects that the Union lost the election by some 28 votes. Lucier's threat to relocate work to Mexico should the Union win was, as noted, made to a gathering of 60 employees, many of whom presumably heard, and may have been influenced by, the unlawful remarks to vote against the Union. Thus, this is not a case where it is ''virtually impossible'' to conclude that the Respondent's misconduct could have adversely affected the election results. Accordingly, I find that Lucier's threat constituted objectionable, as well as unlawful, conduct which interfered with the employees' free choice in the above election, warranting a setting aside of those election results.

CONCLUSIONS OF LAW

1. The Respondent, MK Rail Corporation, is now and at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Operating Engineers, Local 542, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with loss of jobs by diverting work from its Mountaintop facility to its Mexico facility if they selected the Union as their bargaining representative, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. The conduct described in paragraph 3 above also constitutes objectionable conduct affecting the results of the representation election held in Case 4–RC–18429 on September 29–30, 1994.

5. By the conduct described in paragraphs 3 and 4, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having further found that the Respondent engaged in objectionable conduct affecting the results of the election in Case 4–RC–18429, I shall recommend that the election held in that case on September 29-30 be set aside, that a new election be held, and that the Regional Director include in the notice of election the *Lufkin Rule*[15] paragraph set forth below:

NOTICE TO ALL VOTERS

> The election of September 29–30, 1994 was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Election. All eligible voters should understand that the National Labor Relations Act gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, MK Rail Corporation, Mountaintop, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of jobs by telling them that it would divert work from its Mountaintop facility to its Mexico facility if they selected the Union as their bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Mountaintop, Pennsylvania, copies of the attached notice marked ''Appendix.''[17] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election conducted in Case 4–RC–18429 on September 29–30, 1994, be set aside, and that a new election be held at such time and under such circumstances as the Regional Director shall deem appropriate.

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[15] *Lufkin Rule Co.*, 147 NLRB 341 (1964). See also *Gonzales Packing Co.*, supra.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEE
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Section 7 of the Act gives employees these rights.

To organize
To act together for other mutual aid or protection
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with loss of jobs by telling you that work at the Mountaintop facility may be diverted to our Mexico facility if we select International Union of Operating Engineers, Local 542, AFL–CIO, or any other labor organization as our bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

MK RAIL CORPORATION